Supreme Court of the United States

October Term, 1975

No. 75-1645

MARION DAVIS,
Petitioner,

vs.

MARATHON OIL COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT, MARATHON OIL COMPANY, IN OPPOSITION

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BRIEF OF RESPONDENT, MARATHON OIL COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Marathon Oil Company, Respondent, opposes Davis' Petition for Writ of Certiorari to review either the Sixth Circuit Court of Appeals December 12, 1975 Judgment which affirmed the trial court judgment n.o.v. for Respondent, or its February 12, 1976 Order which denied rehearing. Only the latter Order is named in the Petition.

OPINIONS IN COURTS BELOW

The December 12, 1975 opinion of the Court of Appeals, which affirmed the judgment of the trial court, is reported at 528 F.2d 395-404. This report includes on its last page, that court's order denying rehearing. The opinion has been reprinted in the appendix to the Petition at page A3.[1]

The opinion of the District Court stating its reasons for granting judgment for defendant notwithstanding the verdict was entered September 17, 1974 but it has not yet been reported. It is reprinted in the appendix to the Petition at page A22.

The District Court filed an earlier opinion on October 25, 1972 on an issue not presented nor considered in the Court of Appeals. This has been reported in 35 Ohio Misc. 373 and is reprinted in the appendix to the Petition at page A34.

JURISDICTION

Respondent questions jurisdiction of the Court, because the February 12, 1976 Order, from which this appeal is taken, was limited to "consideration of the Petition for Rehearing", and that petition was "DENIED". In several different circumstances, this Court has held that "an appeal does not lie from the denial of a petition for rehearing." *Pfister v. Northern Illinois Finance Corp.*, 317 U.S. 144, 149-50 (1942); *Conboy v. First National Bank*, 203 U.S.

1. The orders and opinions have been reprinted in the Appendix to the Petition and they have not been reprinted in this opposition brief. References designated "A...." are to that Appendix.

141, 145 (1906); *Brockett v. Brockett*, 2 Howard 238, 240 (1844), 43 U.S. 225, 227.[2]

For two reasons, Respondent challenges Petitioner's assertion that United States Constitution, Amendment VII (trial by jury) is involved. (1) No such issue was presented, argued, considered or decided in the Court of Appeals. (2) The Trial Court's 1972 Opinion (A34) recognized plaintiffs' demand for jury trial (A36), and the entry of a judgment notwithstanding the verdict "does not violate the Seventh Amendment's guarantee of a jury trial." *Neely v. Eby Construction Co., Inc.*, 386 U.S. 317 at 321 (1967).

QUESTIONS PRESENTED

Petitioner's question 1 assumes numerous preliminary questions. To facilitate analysis, Respondent states three included questions.

1. Can a constitutional issue, not raised or decided in the Court of Appeals be advanced for the first time by petition for certiorari?

2. Does entry of judgment notwithstanding the verdict pursuant to Rule 50(b) Federal Rules of Civil Procedure abridge the Seventh Amendment provision for jury trial?

3. Did the Court of Appeals properly deny a new trial (a) where the new trial issue was a discretionary ruling by the Trial Court and (b) where the Court of Appeals concluded that there had been no abuse of discretion?

2. See *Microwave Communications, Inc. v. F.C.C.*, 515 F.2d 385, at 387 (C.A.D.C. 1974). "It has long been settled that an order which merely denies rehearing of another order is not itself reviewable." Additional authorities are cited there.

Petitioner's question 2 relates to the trial and appellate court determinations of failure of proof. Respondent restates this below as its question 4.

4. The lower courts properly followed and applied authoritative decisions of this Court and the Court of Appeals judgment is not in conflict with cases cited by Petitioner, because they are different and distinguishable. Rather, Petitioner's "wildly exaggerated allegations" (A27) were not proved.

RULES INVOLVED

In addition to the references in the Petition, attention will be directed to Rule 37(b)(2) Federal Rules of Civil Procedure which is applicable at least by analogy and authorizes sanctions "as are just" for failure to make discovery.[3] Pertinent text of this rule is quoted at page 23 immediately following this brief.

STATEMENT OF THE CASE

1. Nature of This Appeal

The Petition states that it seeks review of the Court of Appeals Order of February 12, 1976 (A1) which denied Davis' petition for rehearing.

By that ruling, the Court of Appeals adhered to its original decision that the Trial Court "properly exercised its discretion" in refusing to permit " 'eleventh hour' wit-

3. By stipulated order, Petitioner was to answer Respondent's Interrogatories two weeks before trial. This contrasts with the filing of Supplemental Answers disclosing surprise witnesses on the Friday before the Monday on which trial was to commence.

nesses to testify because their names had been furnished in supplemental answers to interrogatories only three days before trial was scheduled to begin." (A16).

Earlier, on December 12, 1975, the Court of Appeals had affirmed judgment for Respondent notwithstanding the verdict, saying that Petitioner's "evidence would not permit a reasonable person to find that these allegations [gasoline sales tied to TBA] had been proved." (A6). The Trial Court had concluded that "reasonable minds could not find from the evidence * * * the essential elements of a violation of the Clayton Act * * * or "of the Sherman Act." (A30).

The Complaint in this antitrust action was filed December 29, 1971 by Marion Davis (Petitioner), a former Marathon service station lessee-dealer, and Sparton Distributing Co. (Sparton), an automobile parts supplier, both located in Findlay, Ohio against Marathon Oil Co. (Respondent) whose main office is in the same town.

Count I alleged that Marathon maintained a policy and practice of imposing upon its lessee-dealers exclusive dealing arrangements requiring them to secure their entire requirements of TBA from Marathon. It further alleged the existence of a tying arrangement in which the sales of petroleum products by Marathon were tied to sales of TBA. It claimed that because Davis refused to buy "100 per cent of his TBA from Marathon," his service station lease was cancelled.

Counts II and III repeated the statements of exclusive dealing and of tying arrangements and alleged claims on behalf of Sparton. At the conclusion of plaintiffs' evidence, these were dismissed on Respondent's motion for directed verdict. Judgment of dismissal was entered December 21,

1973[4] and was not subsequently challenged either by motion for new trial or appeal.

Count IV alleged Petitioner's mental pain and suffering brought on by the lease termination, but this was withdrawn by him during trial.

Trial to a jury extended from September 24 to October 1, 1973. At the end of all of the evidence and, in the words of the Trial Court, "In what in retrospect appears to have been an overabundance of caution" (A30), Marathon's motion for a directed verdict was overruled and Davis' claims were submitted to the jury. The jury returned a verdict for Davis, and judgment on that verdict and for attorneys' fees was entered December 11, 1973.

Marathon filed a motion for judgment notwithstanding the verdict or for a new trial. The first motion was sustained, and judgment n.o.v. for the Respondent was entered September 17, 1974.[5] (A19).

In the Court of Appeals, Petitioner protested the judgment notwithstanding the verdict and, in addition, sought a new trial complaining that the Trial Court abused its discretion in excluding the late-reported witnesses. That

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4. "Judgment"

"This action came on for trial before the Court, Honorable DON J. YOUNG, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that defendant's motion for a directed verdict at the end of the plaintiff's evidence, as to plaintiff Sparton Distributing Co. was sustained, and it is

Further ORDERED that the action relating to plaintiff Sparton Distributing Co. is hereby dismissed."

5. The three volume transcript of trial testimony and proceedings was filed January 31, 1974 and was available for Trial Court use in considering the post-trial motions.

Court applied the "reasonable conclusion" test (A6)[6] and held that "there was no evidence that required submission to the jury and the District Court did not err in granting the motion for judgment n.o.v." (A14), and "that the trial judge properly exercised discretion in regard to the surprise witnesses." (A18).

Petition for rehearing was filed by Davis and was denied.

2. The Facts in Evidence

Both lower courts carefully analyzed the evidence. The Court of Appeals summary appears at A8 to A14. The Trial Court summary appears at A23 to A28. The Court of Appeals agreed that there was no evidence of any tying arrangement of either gasoline or of the station lease to TBA purchases (A12). It could not find sufficient evidence that tied sales were "not 'insubstantial'" nor any evidence of a tendency to create a monopoly or to substantially lessen competition (A14). In each of these, it concurred with the Trial Court determination (A27). It was primarily Petitioner's testimony and that of his witnesses,[7] together with additional uncontradicted evidence, on which both courts relied.

Batteries and Accessories. Davis, freely and in many different ways, admitted that while he was operating the Davis' College Marathon station, he bought batteries, ac-

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6. *Brady v. Southern Rwy. Co.*, 320 U.S. 476, 479-80 (1943); 5A MOORE'S FEDERAL PRACTICE 2320 ¶50.02 [1]. The trial court had expressed the same rule as "reasonable minds." (A30).

7. A party vouches for the credibility of the witnesses he calls. *Stamicarbon, N.V. v. Escambia Chemical Corp.*, 430 F.2d 920, 929 (5th Cir. 1970), *cert. denied* 400 U.S. 944; *McConville v. Florida Towing Corp.*, 321 F.2d 162, 165 (5th Cir. 1963). And he should be bound by his own testimony when, as here, it is uncontradicted.

cessories and tires any place he wanted to (37sa-38sa, 70sa).[8] Uncontradicted statistical evidence disclosed that in 1966, 1967, 1968 and 1969 he obtained more than two-thirds of his total credit purchases of batteries and accessories from Sparton and Ohio Automotive, another local supplier, and less than one-third from Marathon (Ex. D, 95sa).

Considering all nine Marathon station dealer-operators in Findlay, Ohio, the total purchases of batteries and accessories from Ohio Automotive were consistently high and during the five year period, 1967 to 1972, exceeded comparable purchases by those dealers from Marathon by $21,767.98 (Ex. H, 98sa-99sa).

Tires. Davis bought tires from the same outside suppliers as when he had operated two Pure Oil stations (13sa-14sa). These were Cooper Tire Company, Goodyear and U.S. Royal and were in addition to tires purchased from Marathon.

Davis said, "I thought I was free to buy wherever I wanted to", and he "did." (14sa). With all other Findlay, Ohio Marathon dealers, it was the same. They bought tires where they wanted to: Goodrich and Firestone from Marathon (Wayne Bishop), Cooper (Bob Phillips), Firestone and Goodrich from Marathon (Chuck Urschalitz), Goodrich from Marathon and Cooper (Merritt Strait, a Marathon operator for 33 years) (430a, 462a, 480a and 496a). Stan Little said he was never pressured to buy (449a). Tire statistics comparable to the battery and accessory exhibits, were not available because Sparton and Ohio Automotive did not sell tires, but freedom of choice was uncontradicted.

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8. In the Court of Appeals there were both an Appendix and a Supplemental Appendix. Page references to these are indicated by .....a and .....sa.

TBA Generally. Salesmen from two major battery and accessories suppliers, other than Marathon, called on Davis' College Marathon station regularly (37sa, 43sa and 53sa). This was obvious and known to everyone and drew no interference from Marathon (280a-81a, 282a-83a and 286a).

Special sales promotions, discounts, and annual dealer-bonus rebates of up to 7 to 10 per cent of total annual TBA purchases (295a) and other incentives were given to Davis and every other Marathon dealer to interest them in purchasing from Marathon.

At the time of trial, Davis readily reaffirmed his earlier deposition testimony that he bought tires, batteries and accessories from whomever he wanted (70sa).

Seeking objective, outside testimony, Davis called Whitman, a terminated former Marathon retail sales development manager. He told the Court, and it remained uncontradicted, that in Marathon's philosophy, the TBA program was set up "for our dealers * * * so that we could have a quality program * * * and *recommend* it to our dealers." (Emphasis added) (72sa, 74sa).

There was no evidence that Marathon's company-wide TBA sales arose from exclusive dealing arrangements of any sort.

TBA was not mentioned in the pre-lease letter of expected responsibilities which was plaintiff's trial exhibit No. 2 (543a-544a).

Davis also called as his witness the Marathon sales representative who originated the recommendation for non-renewal of Davis' College Marathon lease. His reasons for this action "had no relationship" to Davis' TBA purchases (280a-81a).

The four incidents examined in the Court of Appeals opinion[9] (A11-A12) could not be significant in view of Davis' uncontradicted freedom of choice and the three annual automatic lease renewals which occurred.

Gasoline. Gasoline sufficient to carry Davis' College Marathon through the next week "was always furnished." (59sa). Davis accepted no obligation to even make a telephone call to order gasoline. He said it was the Marathon sales representative's "responsibility to order gas." "He was there once a week to do this job." (194a).

Payment for gasoline on the "meter plan" was used by Davis and other Findlay, Ohio Marathon dealers. This system deferred payment until after the gasoline had been sold (8sa-9sa).

Davis always had an adequate supply of gasoline and there is neither claim nor testimony that anyone ever stated or implied that this supply might be impaired or curtailed for any reason.

Station Lease Termination Provision. Petitioner's two prior Pure Oil station leases, his Marathon lease and his subsequent Sun Oil Company station lease were annual leases and each had a provision for termination or non-renewal on 30 days notice (4sa). Davis made use of this 30 day notice provision to terminate his Pure Oil leases before going to the College Marathon station (5sa). He conceded that this "was fair to Pure Oil" and "fair and reasonable" to himself (19sa). He felt that these provisions "were controlling and either side could rely on" them (33sa).

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9. Fifteen batteries, 1966, savings of $2.00 per battery; accessory order returned to Marathon, 1970, "it was just backed up completely as if it had not been instituted in the first place" (270a-71a, 290a-91a); a shock absorber stock purchase and a tire purchase, neither significant.

The Marathon notice of non-renewal was given substantially in advance of the 30 day period and within 10 days after receiving that notice, Petitioner had a new station lease with Sun Oil Co. (555a, 4sa). He continued with that company until he himself decided to give a termination notice and leave that station (5sa).

Petitioner seeks to hide this failure of proof by implying that the true facts are "covert." The reason they appear hidden is that they are non-existent.

Late-Reported Witnesses. Late on Friday afternoon, September 21, 1973, three days before trial with only Saturday and Sunday intervening, Petitioner filed Supplemental Answers to Respondent's interrogatories listing witnesses not previously disclosed. On the first day of trial, Respondent objected to testimony by them. After oral argument, the Trial Court sustained this position. The Judge placed reliance on the discovery rules, on their purpose of avoiding surprise and on due process in permitting proper preparation for trial (102a-105a).

This question was not, in any form, again presented to the Trial Court. No motion for new trial after entry of judgment n.o.v. was filed by Petitioner as anticipated and allowed by Rule 50(c)(2) Federal Rules of Civil Procedure.

On appeal, Petitioner assigned this ruling as abuse of discretion and the Court of Appeals considered it and held "that the trial judge properly exercised discretion in regard to" these witnesses (A18). Rehearing of this issue was denied (A1).

REASONS FOR DENYING THE WRIT

I. Issue of Denial of Jury Trial Was Not Raised in Court of Appeals and Cannot Properly Be Advanced for the First Time on Petition for Certiorari

Petitioner's Issue I intimates that he was denied his Seventh Amendment right to jury trial. The jury demand was considered by the Trial Court long before trial. His ruling (A34-A36) was favorable to Petitioner and has never been challenged.

Petitioner charges that the Trial Judge never intended to and did not, in fact, grant him a jury trial. With no evidentiary support, this suggests grave impropriety on the part of the Trial Court and has been raised, for the first time, by the Petitioner in an attempt to create a constitutional issue. It is completely unwarranted.

In his October 25, 1972 memorandum, the Trial Judge acknowledged that he had "the greatest respect and admiration for the institution of trial by jury'.' (A35). He confirmed plaintiff's jury demand (A37), and the case was tried to a jury. There was no denial of a jury trial.

The Seventh Amendment jury trial issue was never briefed, argued, presented to nor considered by the Court of Appeals. It is not appropriate, now for the first time, to raise this issue on petition for certiorari. Rule 19 1(b) Supreme Court Rules; *United States v. Ortiz*, 422 U.S. 891, 898 (1975); *Wood v. Strickland*, 420 U.S. 308, 327 (1975); *F.T.C. v. Travelers Health Assn.*, 362 U.S. 293, 299 n.4 (1960); *United States v. Rimer*, 220 U.S. 547, 548 (1911).

Supreme Court Rule 19, which states "reasons which will be considered" on petition for certiorari, clearly con-

templates the review of *action taken* by a court of appeals. Where an issue is not presented nor decided in the lower court, there is no action to review.

The summarizing statement in *United States v. Ortiz, supra*, was "we therefore decline to consider this issue, which was raised for the first time in the petition for certiorari." 422 U.S. at 898. In the words of *Wood v. Strickland, supra*, "it would be preferable to have the Court of Appeals consider the issue in the first instance." 420 U.S. at 327. This was described in *F.T.C. v. Travelers Health Assn., supra*, at 299 n.4 as "in accord with accepted principles * * *."

Measured by either of these authorities, the Petition for Certiorari should be denied.

II. Judgment n.o.v. Pursuant to Rule 50(b) F.R.C.P. Does Not Abridge the Seventh Amendment Right to Jury Trial.

The ruling that Rule 50(b) does not violate the Seventh Amendment's guarantee of a jury trial "is settled." *Neely v. Eby Construction Co., supra*, at 321. "The practice [judgment n.o.v.] was an incident of jury trial at common law at the time of the adoption of the Seventh Amendment to the Constitution." *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 at 250 (1940). Therefore, it "must be regarded as a part of the common law rules to which resort must be had in testing and measuring the right of trial by jury as preserved and protected by that Amendment." *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654 at 660 (1935).

This principle is sound, and it is established by decisions of this Court. Further consideration would not be justified.

III. The Court of Appeals Properly Denied a New Trial Where the New Trial Issue Was a Discretionary Ruling by the Trial Court and the Court of Appeals Found No Abuse of Discretion.

Petitioner's only new trial issue is the Trial Court's ruling during the course of the trial that Petitioner's late-discovered and, therefore, late-revealed witnesses would not be permitted to testify. The trial judge relied on the design of the Federal Rules to avoid surprise at trial, the failure diligently to answer interrogatories and due process considerations of opportunity to prepare for trial (102a-105a).

Petitioner's protestation that earlier answers to his interrogatories by Respondent would have sooner directed his attention to the Columbus, Ohio witnesses is clearly unfounded. None of his interrogatories included a request for other "dealer complaints, dealers' names" or "similar pending litigation" (Petition, p. 11) except as to Davis' College Marathon station.

The Court of Appeals properly recognized this preclusion issue as a matter of the Trial Court's discretion which would, in any case, be the measure of sanctions for shortcomings in discovery performance. Rule 37(b)(2) prescribes discovery sanctions "as are just." This means sound discretion. This has been expressed as "wide discretion" exercised in the "manner it deems most effective." *Societe Internationale v. Rogers*, 357 U.S. 197 at 213 (1958). Approved sanctions have been held to include even dismissal with prejudice. *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1211 (8th Cir. 1973). Both denial of presentation of witnesses and of the introduction of evidence have been recognized as appropriate sanctions

within the court's discretion. *Newsum v. Pennsylvania R. Co.*, 97 F. Supp. 500, 502 (D.N.Y. 1951);[10] *Smith v. Schlesinger*, 513 F.2d 462, 467 n.10 (C.A.D.C. 1974). Certainly the Trial Court's ruling meets the *Hickman v. Taylor* admonition that "mutual knowledge of all the relevant facts gathered by both parties is *essential to proper litigation.*" (Emphasis added) 329 U.S. 495 at 507 (1947).

The Court of Appeals considered Petitioner's new trial issue in depth both on the appeal and on petition for rehearing. It found and held that "the trial judge properly exercised discretion in regard to the surprise witnesses." (A18). This was appropriate review.

Where "the trial court is vested with broad discretionary power [in shaping decrees]; appellate review is correspondingly narrow." *Lemon v. Kurtzman*, 411 U.S. 192 at 200 (1972).

The Trial Court's exercise of discretion, having twice been reviewed, would justify this Court's attention only if it "transcended the allowable bounds." *General Stores Corp. v. Shlensky*, 350 U.S. 462 at 468 (1956); *In re Burwell*, 350 U.S. 521, 522 (1956). The Court of Appeals' careful treatment of the new trial issue (A16-A18) demonstrates that it had these tests in mind. Review by this Court would be restricted to the peculiarities of this case and would not involve legal principles of general application.

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10. This authority was acknowledged by the Court of Appeals in its opinion (A18).

IV. The Sixth Circuit Judgment Presents No Conflict. Cases Cited by Petitioner Are Not Applicable. Rather, Petitioner's "Exaggerated Allegations" (A27) Were Not Proved.

It is difficult to understand Petitioner's claim of "apparent conflict" with *Texaco,*[11] *Lessig*[12] and *Osborn.*[13] Viewed realistically, it is without foundation.

Davis' testimonial admission of freedom to buy TBA wherever he wanted to (14sa)[14] was confirmed by uncontradicted statistics. It was corroborated by other Findlay Marathon dealers and by both Sparton and Ohio Automotive salesmen. Beyond this, it was supported by his other witnesses, particularly Whitman.[15] Davis' evidence presented facts and issues far different from the "apparent conflict" cases which he advances.

The Appellate Court's summary of "the proofs submitted at trial" (A8-A14) demonstrates its clear perception of this. It concluded that although the complaint alleged antitrust violations, Petitioner's evidence would not permit a reasonable person to find that his allegations had

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11. *F.T.C. v. Texaco, Inc.*, 393 U.S. 223 (1968).

12. *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir. 1964), *cert. denied* 377 U.S. 993.

13. *Osborn v. Sinclair Refining Co.*, 286 F.2d 832 (4th Cir. 1960), *cert. denied* 366 U.S. 963 (1961).

14. A party's admissions are binding on him. *Glick v. White Motor Co.*, 458 F.2d 1287, 1291 (3rd Cir. 1972); *Winkler v. Columbus*, 149 Ohio St. 39, 43-44 (1948).

15. A party vouches for the credibility of his witnesses. *Stamicarbon N.V. v. Escambia Chemical Corp., supra; McConville v. Florida Towing Corp., supra,* both cited footnote 7 above.

been proved (A6).[16] "Even when construed most favorably to Davis," it did not permit a finding that Marathon tied its gasoline sales or its station lease to the purchase of TBA from Marathon (A12).[17] It found "no evidence" that Marathon at any time refused to supply Davis' requirements of gasoline and "insufficient evidence" to permit a determination that the non-renewal of Davis' lease was related to TBA purchases (A13).

Both *F.T.C. v. Texaco, Inc., supra,* and *Osborn v. Sinclair Refining Co., supra,* were concerned with sales commission agreements between a petroleum company and a manufacturer of TBA. No such contract was involved in this case. Petitioner's naked assumption that the same law applies to purchase-resale transactions is completely unsupported.

Additionally, in *Texaco, supra,* the F.T.C. conclusion was that such a commission contract was an unfair method of competition vis-a-vis other suppliers. 393 U.S. at 229-30. If this were applicable, it was Sparton Distributing Company's issue, not Davis'. All Sparton claims were put finally to rest by the unappealed directed verdict judgment against Sparton.

As a review of a Federal Trade Commission order, *Texaco, supra,* tested the correctness of "an expert body

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16. All the evidence was measured by the reasonable conclusions test of *Brady v. Southern Rwy. Co., supra,* n.6.

17. The evidence was construed most favorably to Davis in accord with the standard of *Wilkerson v. McCarthy,* 336 U.S. 53, 57 (1949). In 1975, this Court denied certiorari in the Sixth Circuit case of *Harrison Assoc. Inc. v. Louisville Gas and Elec. Co.*, 512 F.2d 511 (6th Cir. 1975), *cert. denied* 421 U.S. 988. The Court of Appeals had expressed the rule, "we view the evidence, and reasonable inferences to be drawn therefrom, in the light most favorable to" the plaintiff. 512 F.2d at 513.

charged with the practical application of the statute" (393 U.S. at 226) not a jury. Even so, no per se rule was adopted.

If there is a parallel, it is that Davis' admissions that "I thought I was free to buy wherever I wanted to", and that he "did" (14sa) meet the *Texaco* standard that "Ideally, each service station dealer would stock the brands of TBA that, in his judgment, were most favored by customers for price and quality." 393 U.S. at 229.

The same feeling of freedom to buy differentiates Davis from *Osborn, supra,* wherein Sinclair's subsidiary attempted to have its dealers carry "100% Goodyear TBA products." 286 F.2d at 835. Far from exerting pressure or insisting, Marathon offered its dealers a bonus-rebate up to 10 per cent to encourage TBA purchases from it (A9). Osborn "had no choice." 286 F.2d at 836. Davis did, and he exercised it. From 1966 through 1969, Davis credit purchases of batteries and accessories from Sparton and Ohio Automotive were more than double comparable purchases from Marathon (Ex. D, 59sa). This and other evidence prompted the Trial Court to observe that the *Osborn* "facts bear no resemblance to those actually shown in the present case." (A28). He added "another major distinction" that in *Osborn* there was no benefit to dealers for handling Goodyear. To Davis, Marathon granted favorable prices along with special and increasing refund discounts (A28). *Osborn, supra,* was a far different case and cannot properly furnish a basis for claim of conflict.

Corresponding considerations dissolve any claim of conflict with *Lessig v. Tidewater Oil Co., supra.* Both lower courts recognized *Lessig* as "entirely distinguishable." (A27). Specifically, its issue was gasoline pricing

which is not involved in the present case. The Trial Court found the real distinction in dealers' testimony. In *Lessig, supra,* dealers testified that "they feared to buy competing brands of * * * TBA." When purchased, competing merchandise was hidden. 327 F.2d at 467. The Davis evidence is exactly contrary. He thought he was "free to buy wherever [he] wanted to" (14sa) and all Findlay Marathon dealers exercised this same freedom in purchasing TBA.[18]

That the Court of Appeals found factual distinctions in *Lessig, supra,* appears from its lengthy footnote No. 4 quoting from that opinion (A15-16). *Lessig, supra,* is far different and cannot provide a standard to measure the Davis evidence.

Petitioner has no per se equation to lighten his burden of proof. Neither *Texaco, supra,* nor *Atlantic Refining Co. v. F.T.C.,* 381 U.S. 357 (1965) permitted per se finding even under the old commission type contracts (not involved in this case) with TBA suppliers. And no tying arrangement was, in fact, proved to bring this case within the rule of *Northern Pacific Ry. v. United States,* 356 U.S. 1 (1958). This is not a conflict appeal and cannot be tortured into one.

Petitioner's failure of proof extended to both the substantiality and the commerce requirements for antitrust jurisdiction.

With no evidence that any Marathon dealer's TBA purchases were tied to his lease or his gasoline purchases, no substantial volume of sales could have been involved. Proof of substantiality is a statutory requirement. 15

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18. See "The Facts in Evidence" above at p. 8.

U.S.C. §14[19] "* * * an exclusive dealing and tying arrangement with [one dealer] alone could not have had the probable effect upon commerce required to make out a violation." *Lessig, supra*, at 472. This is so because "the Clayton Act was not intended to reach every remote lessening of competition." *Technical Tape Corp. v. Minnesota Mining & Mfg. Co.*, 247 F.2d 343 at 358 (2nd Cir. 1957), *cert. denied* 355 U.S. 952 (1958).

Nor did Petitioner meet the essential Clayton Act requirement that the alleged anti-competitive conduct must be "in commerce." *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 195 (1974); *U. S. v. American Bldg. Maint. Ind.*, 422 U.S. 271, 276 (1975). All Marathon sales to Davis were localized in Ohio. His proofs showed no tied sales to any Marathon dealers, a fortiori, none "in commerce." Absent such evidence, this basic Clayton Act requirement remained unproved. The Court of Appeals properly referred to this (A6-A7) in considering the Clayton Act Section 3 allegations.

The observations as to antitrust violations apply equally to Petitioner's Sherman Act claims. A contract which "does not fall within the broader proscription of Section 3 of the Clayton Act * * * is not forbidden by those of" Sections 1 and 2 of the Sherman Act. *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 at 335 (1961).

Statutory principles of antitrust law and decisions of this Court were properly applied by the Court of Appeals and further review would serve no general legal purpose.

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19. A violation of the Clayton Act occurs only where "the effect of * * * such condition, agreement or understanding may be to *substantially* lessen competition * * * in any line of commerce." (Emphasis added) 15 U.S.C. §14.

CONCLUSION

The Petition does not meet this Court's Rule 19 1(b) standards for allowance of writ of certiorari and should be denied.

Respectfully submitted,

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ADDENDUM

Rule 37 Federal Rules of Civil Procedure

FAILURE TO MAKE DISCOVERY: SANCTIONS

* * * * *

(b) Failure to Comply with Order.

* * * * *

(2) *Sanctions by Court in Which Action is Pending.* If a party or an officer, director or managing agent of a party or a person designated under Rule 30(b) (6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

* * * * *

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence; * * *.